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# *Fishing –*

**Aboriginal Rights in British Columbia**

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Services  
Society



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*Editor:* Anne Rose

*Designer:* Lesa Moriarity

*Writer:* Michele Guerin

*Native Programs, Public Legal Education*

*Co-ordinator:* Kent Patenaude

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### ***Important – Please read***

This publication is for general information only. It should not form the basis for legal advice of any kind. Also, laws change from time to time. Please check the current law with a lawyer.

This information may not apply to you if your band or tribal council is governed by any form of First Nations self-government legislation, or if your band/tribal council has a separate by-law that affects these laws and regulations.

This booklet talks about fishing laws and regulations for aboriginal people. It is up to you to let your band/tribal council and the federal government know how the law affects you, your family, and your community.



# Introduction

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## What is this booklet about?

This booklet is about aboriginal fishing rights in British Columbia. If you are a status (registered) Indian,\* this booklet will tell you about your legal right to catch fish in both salt and fresh waters for food, ceremonial, and societal needs. It will explain when you can legally sell fish. This booklet will *not* help you understand your fishing rights if you are Métis or a non-status Indian (see page 9).

Aboriginal fisheries in the province are managed by the Department of Fisheries and Oceans (DFO), which is responsible for the conservation and management of all tidal water fisheries in British Columbia. (This includes saltwater fisheries and *salmon* in fresh water.) The government of Canada also negotiates fishing agreements every year with individual bands and tribal councils. Many bands and tribal councils have additional fishing regulations you must follow in their territories.

This booklet talks about these regulations, and tells you who has the authority for licensing in each area of the province. It also explains:

- ~ what the Constitution says about aboriginal fishing rights

\* If you received your Indian status as a result of Bill C-31, you are considered a status Indian for the purposes of this booklet.



- ~ how the *Sparrow* court decision has significantly changed the law affecting the right of aboriginal people to catch and sell fish in B.C.
- ~ the Aboriginal Fisheries Strategy (AFS)
- ~ fishing agreements and licences
- ~ where aboriginal people can fish legally in British Columbia
- ~ how the *Jones* and *Van der Peet* court decisions have affected the rules about the sale of fish caught by aboriginal people

The pull-out section in the centre of this booklet is a quick reference on aboriginal fishing rights. It is designed so that you can carry it with you while fishing.

### ***Fishing responsibly***

The traditional fishing methods used by aboriginal people vary from region to region in British Columbia. So do the traditional uses for the fish that are caught.

It is important to be aware of and respect the band or tribal council territory you are fishing in.



# **Aboriginal fishing rights: The Constitution and the Sparrow decision**

## **What is the Constitution, and what does it say?**

The Constitution is the basic law of Canada. It is the system of laws and principles all Canadians must follow.

Section 35 of the Constitution Act, 1982 says:

- 35(1) The existing aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.
- 35(2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada.

This means the Constitution acknowledges and confirms that aboriginal rights are protected in Canada. However, the Constitution does not specify which aboriginal rights are protected.

Aboriginal fishing rights have been made clearer by the *Sparrow* decision.

## **What is the Sparrow decision?**

To understand aboriginal fishing rights today, it is important to know about the decision made by the



Supreme Court of Canada in the case *Sparrow v. the Queen* (1990) — known as the *Sparrow* decision. This case is the usual starting point for any discussion about aboriginal fishing rights.

## **History**

The Musqueam Indian Band, which is located in British Columbia at the mouth of the Fraser River, was issued a licence in 1984 that allowed its members to fish for food. The licence listed a number of restrictions, including fishing times, places and methods of fishing, and the length of drift nets to be used. In the past the band had been allowed to use nets that were 75 fathoms long. On the 1984 licence, the allowed net length was reduced to 25 fathoms.

On May 25, 1984, Ron Sparrow Jr. was fishing with a 45-fathom net in traditional Musqueam fishing territory: Canoe Pass, in the Fraser River. Sparrow was charged under the Fisheries Act for using a net longer than the 25-fathom maximum permitted by the band's food fishing licence.

The Musqueam Indian Band used Ron Sparrow's charge as a test case for an aboriginal fishing rights defence based on Section 35 of the Canadian Constitution. The issue was whether the net length restriction on the Musqueam Band's Indian Food Fishing Licence was inconsistent with Section 35(1) of the Constitution Act, 1982.



## **The court's decision**

In the *Sparrow* decision, the Supreme Court of Canada said that fishing is one of the aboriginal rights protected under Section 35(1) of the Constitution Act, 1982. This means that any aboriginal person can fish in his/her band's traditional fishing waters.

## **Important legal points**

The *Sparrow* decision established seven important legal principles:

1. Aboriginal people have the legal right to fish for food, ceremonial, and societal purposes.
  - ~ This means that you can fish anywhere in B.C. as long as the fish will be used for food, ceremonial, or societal (social) purposes.

*Note: "Societal purposes" has not yet been defined by the federal and provincial governments, or by Canada's bands and tribal councils.*

2. Aboriginal fishing rights in the province can only be taken away if the aboriginal people of B.C. agree to give up their fishing rights.
  - ~ This means that aboriginal fishing rights have never been taken away by previous Fisheries Act regulations. Federal and provincial government fishing regulations are



management tools used to control and protect the number and species of fish in Canada. These government regulations can't replace aboriginal fishing rights in British Columbia.

3. Aboriginal fishing rights are flexible in nature, and must be interpreted flexibly so they can evolve over time.

- ~ This means that aboriginal people can use modern equipment and technology when fishing without affecting their aboriginal fishing rights.

4. Aboriginal fishing rights have "first priority" — second in importance only to the conservation of the province's fish population.

- ~ This means that aboriginal fisheries must take priority in fisheries planning, and that aboriginal fisheries are more important than any other fishing interest, including commercial and sport fisheries.

Also, if there are only enough fish to meet conservation levels and aboriginal fishing requirements, the DFO must ensure that the province's aboriginal people are able to fish their quota before other fishing groups.

5. The courts say that Section 35 is a "promise" to the aboriginal people of Canada. They have ruled



that Section 35(1) must be interpreted and applied in a way that upholds the honour of the Crown. It must also take into account the Crown's "historic fiduciary" relationship with aboriginal people.

~ This means that Canada's laws on aboriginal rights must be interpreted in a useful and meaningful way for aboriginal people. And that the government and aboriginal peoples of Canada must work together toward this goal.

6. The aboriginal right to fish, outlined in Section 35(1) of the Constitution, is a collective right. This right is considered *sui generis* — of a unique nature — and belongs to a distinct community. This right is not acquired from Parliament but is inherited by aboriginal people from their ancestors.

~ This means that aboriginal fishing rights belong to entire native communities (or bands), not to individual band members. An aboriginal person cannot drop a net just anywhere in B.C. and claim to be exercising an aboriginal right.

Band members can exercise their fishing rights only in the traditional territory of their aboriginal community (their band or tribal council's territory).



7. If the Canadian government imposes a regulation that limits aboriginal people's fishing rights, this infringement must be justified. The courts say the Canadian government must ensure that such a restriction is not "unreasonable."

This restriction cannot cause "undue hardship" or deny aboriginal people their "preferred means of exercising their rights." Section 35(1) also protects aboriginal people against provincial legislative power.

- ~ This means the courts recognize the role of federal regulations in fisheries conservation and management. But the courts have also created specific tests and rules so that the government will have to justify any legislation that negatively affects aboriginal rights.

The courts have also ruled that the federal government must discuss any regulation that may affect a band's aboriginal fishing rights with the band that will be affected.



## ***Fishing rights: Non-status Indians and Métis in British Columbia***

This booklet explains the fishing rights of status (registered) Indians only. If you are a non-status Indian or Métis living in British Columbia, this booklet will *not* help you understand your fishing rights.

*Note: If you received your Indian status as a result of Bill C-31, you are considered a status Indian for the purposes of this booklet. You can also ask the band that re-instated you about your fishing rights.*

If you are a non-status Indian or Métis, the following groups can help you understand your fishing rights in British Columbia:

### ***Non-status Indians***

If you are a non-status Indian, telephone the United Native Nations in B.C. at (604) 688-1821.

### ***Métis people***

If you are Métis, you must exercise your aboriginal fishing right to fish for food, ceremonial, or societal needs in Métis traditional territories.

For more information, telephone the Métis National Council in Ottawa at (306) 373-8855. The Legal Services Society booklet called *The Rights of the Métis in British Columbia* is also helpful. To order this booklet, you can write or call:

Distribution Clerk,  
Legal Services Society  
1500 – 1140 W. Pender Street  
Vancouver, B.C. V6E 4G1  
Telephone: (604) 660-4600  
Fax: (604) 660-4420



# ***The Aboriginal Fisheries Strategy: The Canadian government's response to the Sparrow decision***

## **What is the Aboriginal Fisheries Strategy?**

The Aboriginal Fisheries Strategy (AFS) is a national fisheries program. It was created by the federal government in 1992 to ensure that the rulings of the *Sparrow* decision are carried out. The seven-year AFS program is designed to stabilize the Canadian fishery and increase economic opportunities for aboriginal people.

The Aboriginal Fisheries Strategy applies mostly to the Atlantic and Pacific coastal areas of Canada. Generally, the management of the fisheries in the inland provinces and aboriginal territories has been transferred to those inland provincial governments and aboriginal territories.

The AFS is a particularly important program because of the recent advancements in fishing technology. In B.C., the share of available fish that can be caught by each fishing group is: commercial fishers 94 per cent, recreational sport fishers 3 per cent, and aboriginal groups 3 per cent.

The federal government is spending about \$140 million over seven years on the Aboriginal Fisheries



Strategy. Approximately 70 per cent of those funds are being spent in British Columbia.

## **What are the goals of the AFS?**

### **1. Protection of fishing rights**

The AFS supports the right of aboriginal people with Indian status to fish for food, ceremonial, and societal purposes.

### **2. Self-government in the fishing industry**

The AFS program is designed to give aboriginal communities in Canada a greater role in fisheries conservation and management, and to provide economic development and employment opportunities.

Under the AFS program, bands and tribal councils are participating in the development of regulations for their own fisheries. (These regulations are in addition to the basic AFS regulations, and the AFS agreements some bands have with the DFO.)

For example, individual food fishing permits are no longer issued by the Department of Fisheries and Oceans. Instead, the management and distribution of a band member's catch is administered by the appropriate band.

Also, the legal number of fish (by species) that can be caught by aboriginal people is now governed by



communal licences; the total number of fish that can be caught is negotiated by each band with the government.

### **3. Legal sale of fish**

The AFS has established several pilot sales programs with B.C. bands. These programs are studying the legal sale of fish caught by aboriginal people in the province.

### **How does the AFS work?**

There are 196 First Nations and 90,700 status aboriginal people in B.C. (according to the B.C. government).

The federal government negotiates individual fishing agreements with individual bands, tribal councils, and other aboriginal groups on a range of issues, including fish habitat protection, habitat enhancement training, fishing regulations, regulation enforcement training, and economic development. In 1994 there were more than 50 AFS agreements in place with B.C. aboriginal groups.

### **What is an AFS agreement?**

Individual bands and tribal councils negotiate their own AFS agreements with the Department of Fisheries and Oceans. These agreements show how much money the federal government will contribute to the band; who is



responsible for fisheries regulations enforcement, training programs, and stock assessment research; and what the band's fish plan will include.

Fish plans are developed by an individual band and the DFO (together). They list a number of guidelines, including:

- ~ quotas on numbers and species of fish to be caught
- ~ allowed fishing times (e.g., one to two days per week)
- ~ equipment restrictions (e.g., nets of various lengths; mesh sizes)

*Note: AFS agreements do not define or limit aboriginal treaty rights — or limit the authority of Canada's Fisheries Act.*

## **Who enforces AFS agreements?**

DFO fishery officers are responsible for the enforcement of the Fisheries Act and regulations in aboriginal fisheries. Under fisheries agreements, many bands and aboriginal groups hire aboriginal fisheries officers, who may be certified as fishery guardians under the Fisheries Act. These officers work closely with DFO fisheries officers to enforce the fishing regulations in their band or tribal council territory. They can provide you with catch information and the fishing regulations for their band or tribal council territory.



Aboriginal fisheries officers help monitor the unloading and transportation of fish, and record the number of fish caught by each band. They also play a large role in the management of fish habitat, and report directly to the DFO if any fishing activity is harmful to fish habitat.

Certified aboriginal fisheries officers (or guardians) regularly patrol (on land and water) their band or tribal council territory to monitor fishing activity. If required, they:

- ~ issue warnings
- ~ gather evidence
- ~ lay charges
- ~ take statements
- ~ seize fish and equipment
- ~ testify in court

### **Do I have to obey AFS regulations?**

In most areas of the province, individual bands and the DFO have agreed on a number of enforcement issues. Nets, fish, and boats can be seized when these regulations are not respected. The enforcement of these regulations is carried out by both guardians and the DFO's fisheries officers.

*Note: Even if your band has not signed an AFS agreement, the right to fish includes the duty to be responsible. Anyone*



*who is catching fish in British Columbia needs to respect fish habitat and the province's fish resource.*

### **What will happen when the AFS program is finished?**

The AFS is often referred to as a "Sunset Program." This is because it will end in the year 1999.

Treaty negotiations over outstanding land claims are underway between B.C. bands, the Canadian government, and the province of B.C., but this process could take years to settle. In the meantime, individual bands and tribal councils are negotiating Interim Measures Agreements, which will protect and manage the fishing resource until the treaty negotiations are complete.

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## ***Where can I fish, and do I need a licence?***

### **Can a status Indian fish anywhere in B.C.?**

The *Sparrow* court decision gives status Indians the legal right to fish for food, ceremonial, and societal needs — in their own band's traditional territory. If you want to fish for food, ceremonial, or societal purposes in *another* band's territory, you need to find out which band territory you are in, contact that band, and request their permission.

*Note: Turn to page 18 for a map of B.C. First Nations. Your local DFO office may be able to help you identify band and tribal council territories.*

### **Does a status Indian need a licence to fish for food, ceremonial, or societal purposes in fresh and tidal waters in B.C.?**

If you are fishing in your band or tribal council's traditional territory for food, ceremonial, or societal purposes, check your band's communal fishing licence for the regulations in your territory.

If you are fishing in *another* band or tribal council's traditional territory (for food, ceremonial, or societal purposes), you need to find out which band territory you are in, contact that band, and request their permission to fish. You will also need information about the fishing regulations in their territory.



Status Indians don't need a federal or provincial fishing licence to fish for food, ceremonial, or societal purposes in fresh or tidal waters in B.C.

### **Does a status Indian need a licence to sportfish in tidal waters in B.C.?**

The federal government manages British Columbia's tidal water fisheries. As the *Sparrow* decision does not talk about sportfishing, we recommend that you follow the DFO's standard sportfishing regulations.

To sportfish in tidal waters, you need:

~ a DFO saltwater fishing licence

AND

~ a DFO salmon stamp if you are sportfishing for salmon in tidal waters

### **Does a status Indian need a licence to sportfish in fresh waters in B.C.?**

The provincial government manages British Columbia's freshwater fisheries. In the province's Wildlife Act, it says in the licensing section that status Indians who have lived in B.C. for six months do *not* need provincial angling licences to sportfish in fresh waters.

**Recommended:** Even though status Indians do not require provincial freshwater fishing licences, we recommend that you follow the province's standard rules and regulations for freshwater sportfishing.







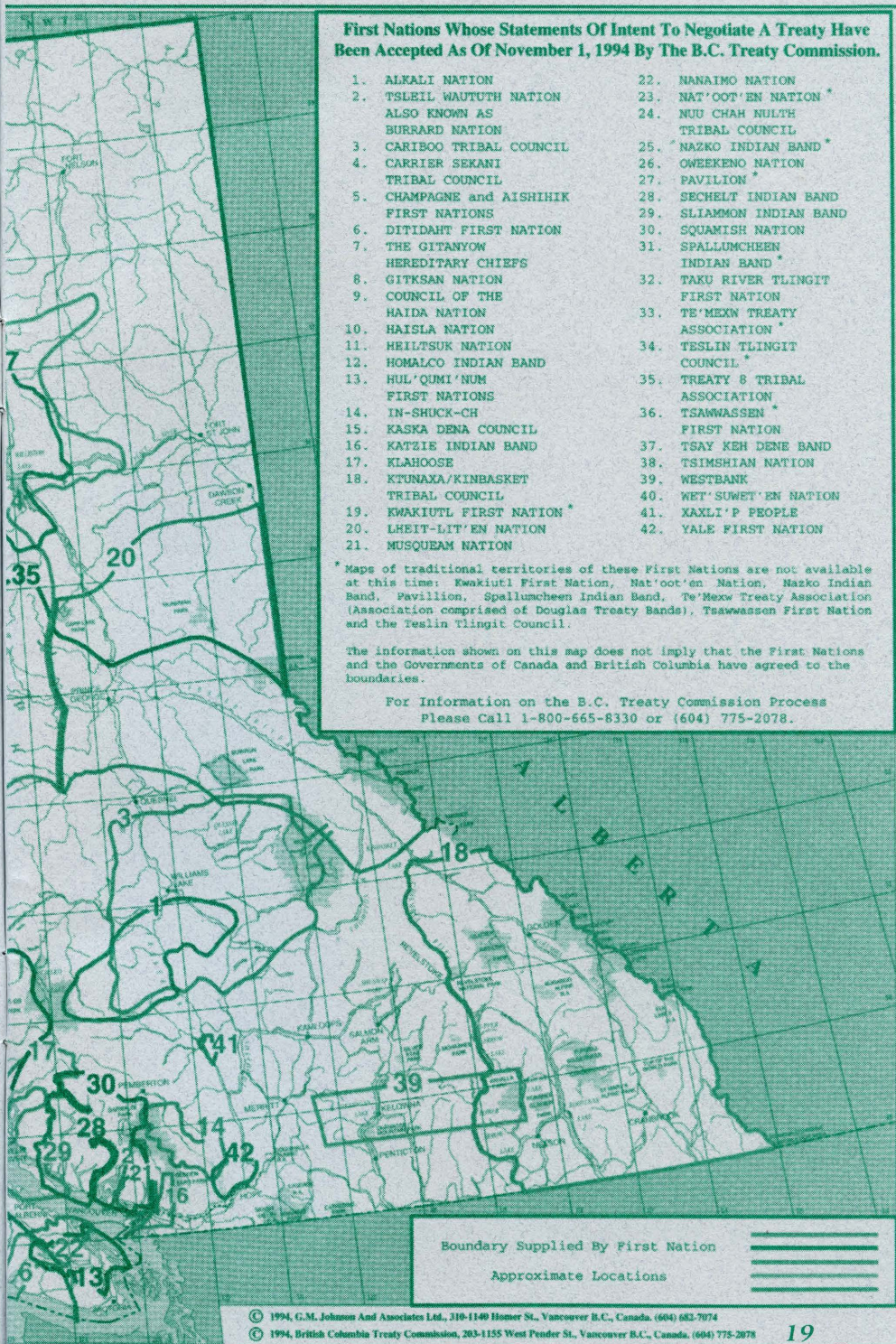
**First Nations Whose Statements Of Intent To Negotiate A Treaty Have  
Been Accepted As Of November 1, 1994 By The B.C. Treaty Commission.**

- |  |  |
|--|--|
| 1. ALKALI NATION   | 22. NANAIMO NATION                     |
| 2. TSLEIL WAUTUTH NATION<br>ALSO KNOWN AS<br>BURREARD NATION | 23. NAT'OOT'EN NATION *                |
| 3. CARIBOO TRIBAL COUNCIL                                    | 24. NUU CHAH NULTH<br>TRIBAL COUNCIL   |
| 4. CARRIER SEKANI<br>TRIBAL COUNCIL                          | 25. NAZKO INDIAN BAND *                |
| 5. CHAMPAGNE AND AISHIHIK<br>FIRST NATIONS                   | 26. OWEKENO NATION                     |
| 6. DITIDAHT FIRST NATION                                     | 27. PAVILION *                         |
| 7. THE GITANYOW<br>HEREDITARY CHIEFS                         | 28. SECHLT INDIAN BAND                 |
| 8. GITKSAN NATION  | 29. SLIAMMON INDIAN BAND               |
| 9. COUNCIL OF THE<br>HAIDA NATION                            | 30. SQUAMISH NATION                    |
| 10. HAISLA NATION  | 31. SPALLUMCHEEN<br>INDIAN BAND *      |
| 11. HEILTSUK NATION  | 32. TAKU RIVER TLINGIT<br>FIRST NATION |
| 12. HOMALCO INDIAN BAND                                      | 33. TE'MEXW TREATY<br>ASSOCIATION *    |
| 13. HUL'QUMI'NUM<br>FIRST NATIONS                            | 34. TESLIN TLINGIT<br>COUNCIL *        |
| 14. IN-SHUCK-CH  | 35. TREATY 8 TRIBAL<br>ASSOCIATION     |
| 15. KASKA DENA COUNCIL                                       | 36. TSAWASSEN *<br>FIRST NATION        |
| 16. KATZIE INDIAN BAND                                       | 37. TSAY KEH DENE BAND                 |
| 17. KLAHOOSE   | 38. TSMISHIAN NATION                   |
| 18. KTUNAXA/KINBASKET<br>TRIBAL COUNCIL                      | 39. WESTBANK                           |
| 19. KWAKWUTL FIRST NATION *                                  | 40. WET'SUWET'EN NATION                |
| 20. LHEIT-LIT'EN NATION                                      | 41. KAXLI'P PEOPLE                     |
| 21. MUSQUEAM NATION  | 42. YALE FIRST NATION                  |

\* Maps of traditional territories of these First Nations are not available at this time: Kwakiutl First Nation, Nat'oot'en Nation, Nazko Indian Band, Pavilion, Spallumcheen Indian Band, Te'Mexw Treaty Association (Association comprised of Douglas Treaty Bands), Tsawwassen First Nation and the Teslin Tlingit Council.

The information shown on this map does not imply that the First Nations and the Governments of Canada and British Columbia have agreed to the boundaries.

For Information on the B.C. Treaty Commission Process  
Please Call 1-800-665-8330 or (604) 775-2078.



Boundary Supplied By First Nation

Approximate Locations



## *Can I sell my fish?*

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### **Do aboriginal people have the legal right to sell fish commercially ?**

To legally sell fish commercially in British Columbia, an aboriginal person must have a commercial fishing licence or belong to a band that has a negotiated sales agreement with the DFO. As of April 1995, there are approximately 25 bands in B.C. who have a negotiated sales agreement with the DFO. These bands are part of an AFS study on legalizing the sale of fish caught by aboriginal people.

However, the law may change when the Supreme Court rules on the aboriginal right to sell fish commercially (with the *Van der Peet* and other court decisions now being appealed). The government may also decide to accept or reject the sale of fish caught by aboriginal people after completing its three AFS pilot projects. These projects are being carefully watched and studied by the federal and provincial governments, and by aboriginal bands and industry groups.

### **What the courts say —**

#### **The *Sparrow* decision (1990)**

In the *Sparrow* decision, the Supreme Court judge said the conflict over aboriginal fishing rights will worsen as the number of available fish drops and the demand for



fish rises. The judge refused to rule on the aboriginal right to fish for commercial purposes, and said the issue should be resolved through negotiation.

### **The *Van der Peet* decision (June 1993)**

The *Van der Peet* court case specifically addressed the aboriginal right to legally sell fish. The case was heard before five judges; three of the judges ruled against the right to sell fish. Judge Lambert, who ruled in favour of the aboriginal right to sell fish, said:

*"Aboriginal fishing rights... include a right to catch and, if they wish, to sell sufficient salmon to provide all the people... with a moderate livelihood."*

The *Van der Peet* decision has been appealed. It will be heard by the Supreme Court of Canada in late 1995 or early 1996.

### **The *Jones and Nadjiwown* decision (April 1993)**

In southern Ontario, the Saugeen Ojibway Nation went to court when the Ontario Ministry of Natural Resources banned the sale of fish by aboriginal people and established quotas on fish caught.

Judge Fairgrieve, of the Ontario Court Justice, ruled that there is an existing aboriginal or treaty right to fish for commercial purposes, and that the Saugeen Ojibway band can decide how much it wants to fish. Today, this ruling is commonly known as the *Jones* decision.



The Saugeen Ojibway band is the only aboriginal community in Canada that has a *commercial* fishing right recognized by a court of law as constitutionally protected under Section 35(1).

*Note: The government has no plans to appeal the Jones decision.*

### **What the government says —**

The Department of Fisheries and Oceans says aboriginal people can sell fish if they have a negotiated sales agreement. (Approximately 25 bands in B.C. have one of these agreements, as part of the three AFS pilot projects on the sale of fish caught by aboriginal people.)

Any sale of fish not covered by a negotiated sales agreement, or by commercial licence agreement, is illegal.

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